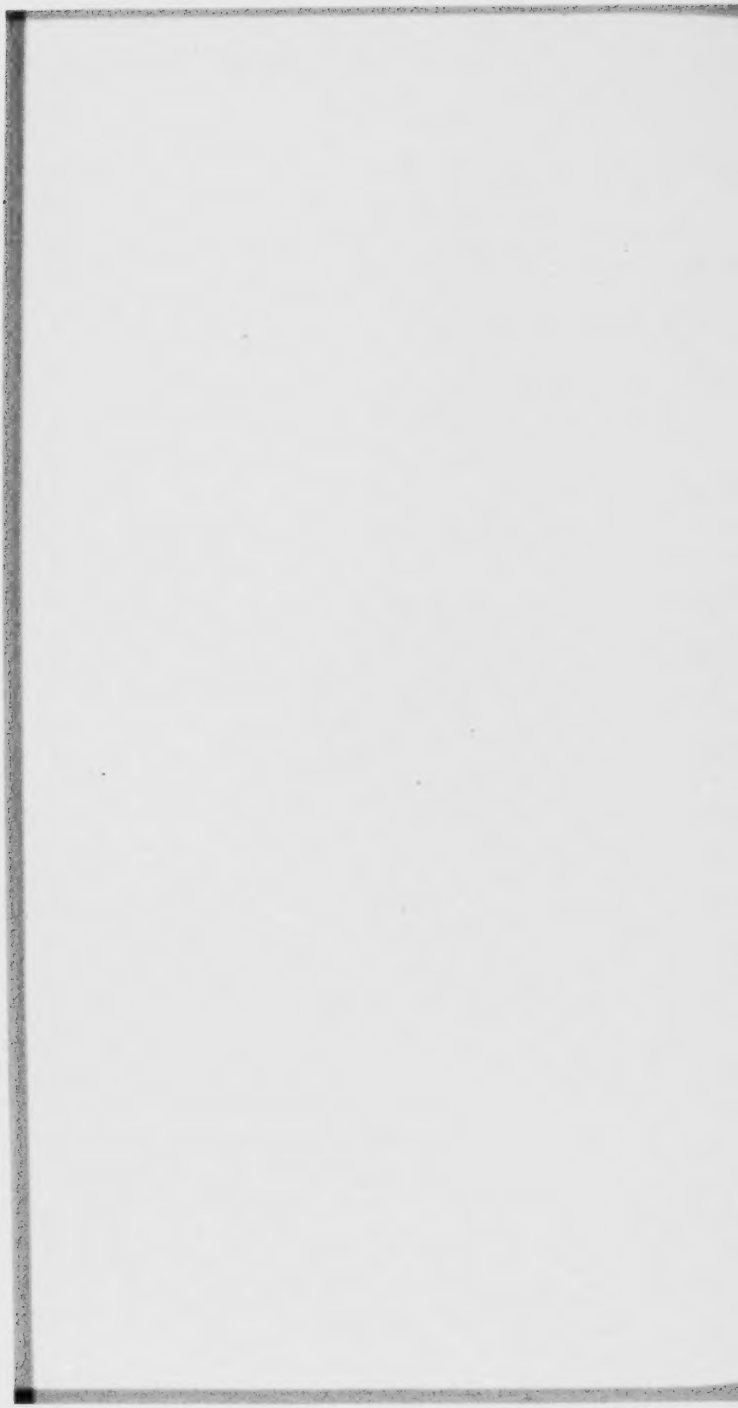

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No. 224.

Brief of East for D. C.

No. 224.

Filed Jan. 7, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

The Guarantee Co. of North America

vs.

Mechanics Savings Bank and Trust Co., to use of James Pryor, Assignee.

In Error to Circuit Court of Appeals for the Sixth Circuit.

BRIEF OF

EDWARD H. EAST,

SOLICITOR FOR DEFENDANT IN ERROR.

MARSHALL & BRUCE CO., NASHVILLE, TENN.

In Supreme Court of the United States.

OCTOBER TERM, 1898.

Guarantee Company of North America,
PLAINTIFF IN ERROR,

v.

Mechanics' Savings Bank & Trust Company,
DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF APPEALS
FOR SIXTH CIRCUIT.

May it please the Court:

This record is brought to this court by certiorari to the Court of Appeals for the sixth circuit, to review a judgment of that court affirming the judgment of the Circuit Court of the United States for the Middle District of Tennessee, in favor of J. J. Pryor, assignee of the Mechanics' Savings Bank & Trust Company, against the Guarantee Company of North America, a Canadian corporation, for the amount of two bonds given by plaintiff in error, insuring the bank against loss by dishonesty of its teller, John Schardt, and the same person as its cashier, he having filled the two positions in succession.

IN RE OF TELLERS' AND COLLECTORS' BOND.

The teller's bond is dated January 16th, 1888, and was renewed from year to year until January 1, 1893. This bond was in the penal sum of $10,000, for which the bank paid $100, and, to effect a continuation of said bond for ensuing years; a like consideration was to be paid by the bank annually, which was done, and the bond was continued current until the 16th day of January, 1893.

The condition of the bond is:

"To make good and reimburse to the employer such pecuniary loss as the employe shall have sustained by the *fraudulent* acts of the employe, in connection with the duties of said office or position, or with any other duties assigned to him by the employer in the said service, committed by him, and discovered during the continuance of this bond, and within six months from the employe ceasing to be in said service."

Rec. 9-13.

There are many conditions and provisions attached to this bond, and agreed to be observed, not necessary to notice in this litigation. I here quote such only as it is insisted are necessary to the adjudication of this case, and are agreed to be "observed and binding as a part of this bond:"

"That this bond is *issued* and *renewed* on the express understanding that the employe has not within the knowledge of the said employer, at any former period, either in this or other employment, been guilty of any default or serious dereliction of duty.

"That the employer shall observe, or cause to be observed, all due and customary supervision over the said employe for the prevention of default, and if employer shall, at any time during the currency of this bond, *condone* any act or default on the part of the employe which

would give the employer the right to claim hereunder, and shall continue the employe in his service, without notification to the company, the said company will not be responsible hereunder for any default which may occur *subsequent* to said act or default of said employe so condoned.

"That the employer shall at once notify the company, on his becoming aware of the said employe being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits.

"That there shall be *an inspection* or audit of accounts or books of the employe on behalf of the employer at least once in every twelve months from date of this bond."

The bond also declares in its preamble the following:

"And, whereas, the employer has delivered to the company a certain statement, and it being agreed and understood that such statement constitutes an essential part of the contract hereinafter expressed.

This statement is nowhere identified or more definitely pointed out.

The Guarantee Company contends that the paper referred to is the one signed by C. W. Peden, the then cashier of the bank, as this was the only paper delivered to the company either before or contemporaneously with the execution of the bond, and which consists of questions and answers.

On this theory, I now quote such questions and answers as are supposed to enter into this lawsuit:

Question 8. What is your custom in regard to frequency of *inspection*? Are they at stated periods or irregular, and what is the longest time allowed to elapse between inspections?

Answer. Every quarter.

Question 9. Has the bank a duly appointed and authorized inspector or inspectors. If not, by whom are the inspections made?

Answer. The finance committee.

Question 18. In the event the employe filling the post of teller, how often, and by what officer will the teller's cash be checked and counted?

Answer. By finance committee quarterly.

Rec. 86, 87.

The questions and answers are concluded by this declaration:

"I hereby declare that the answers and representations above made are true, and that I am not aware of any matter or thing affecting the character or reputation of the applicant which should create any doubt as to his reliability or trustworthiness.

"Dated at Nashville, Tenn., this 21st day of January, 1888. (Signature) C. W. PEDEN,

"Cashier, on behalf of bank."

Rec. 87.

There is no effort in this bond to make these statements and declarations warranties. There are no warranties in this bond.

The teller's bond was renewed from year to year by the payment of the $100 by the bank, and without any specific questions or answers additional, but before the bond was renewed each year, the defendant company sent out to its patrons a printed circular, in which, among other things, was the following:

"It is necessary, before the bond can be renewed, that you obtain the certificate on the back hereof, by your president or cashier, and on its return with remittance of the premium, the renewal can be immediately effected."

Rec. 88.

The certificate on the back was filled up and signed by the cashier, and among other things, it stated that the accounts of said teller, Schardt, had been *examined* and

verified by the finance committee of said bank, and the bond was not renewed any year until this certificate had been made out and delivered to the defendant company.

Rec. 88.

This statement only applied to the teller's bond.

The embezzlements as teller and collector commenced September 12, 1890, and continued during the currency of the several bonds, successively, to January 1, 1893, when Schardt became cashier, vice Sykes, resigned.

The embezzlements, as shown by the experts, are subdivided, as follows:

From Sept. 1, 1890, to Jan. 16, 1891	$ 5,879.34
From Jan. 16, 1891 to Jan. 1, 1892	22,290.00
From Jan. 1, 1892 to Jan. 1, 1893	50,649.90
Total (record, page 28)	$77,819.24

HOW EMBEZZLEMENTS WERE COVERED ON THE BOOKS.

These various embezzlements were covered on the books of the bank, and detection prevented:

1. By false additions.
2. Failure to enter notes discounted.
3. Failure to enter money collected.
4. Failure to give proper credits to depositors on the books of the bank.
5. Failure to credit on the books of the bank interest paid on notes.

Rec p. 29, q. 4; Rec. 40, q. 10.

Nearly all of the embezzlements were covered on the

books by misstating the amount due depositors upon the books kept by Schardt.

Rec. 32. q. 14; q. 23. p. 33.

The expert, McEwen, and others, when asked if these abstractions and embezzlements were easily detectable from the books of the bank, testified:

"They could have easily have been detected by an expert bookkeeper His falsifying of the books was done, in main, in false additions on the cash book, and whenever this was done he nearly always falsified the general account of individual depositors on his general ledger, to correspond with the errors made on the cash book. A few of his false additions on his cash book were covered up by falsifying one or more of his other accounts on his general ledger. The amount shown as due individual depositors by the account on the general ledger, was far less than that actually shown to be due by the pass books of depositors."

Rec. 29. q. 5.

The two expert bookkeepers (McEwen and Jennings), with their assistants (Fisher and Northern), were engaged in this work "several months."

Rec. 29, q. 7.

It was necessary to refer to various and different books. (Rec. 29, ques. 9.) All pass books had to be called in. (Rec. 29, ques. 10.) In some instances no deposit tickets could be found.

Rec. 29. q. 11.

BOOKS KEPT BY THE BANK (Rec. 30, ques. 4).

1. Individual ledger, kept by a clerk.
2. General ledger, kept by Schardt until made cashier.

3. Cash book, kept by Schardt until made cashier.

4. Daily balance book, kept by Schardt until made cashier.

Pryor gives the books kept by the bank, as follows: General ledger, individual ledger, cash book, deposit register, check register, discount register, and such auxiliary books as experience showed to be necessary.

Rec. 58, q. 10.

The individual ledger showed the deposit account of each individual depositor.

General ledger shows every account in the bank except that of individual depositors, viz.: Demand loans, discounts, bonds, stocks, and such. It has also an account showing in totals the deposit made and checked out each day by individual depositors. This book was kept by Schardt from beyond 1890 to the time the bank closed (April 17, 1893).

The cash book shows the same things as the general ledger, except that instead of putting the business of each day under various accounts, they are grouped together on one page in the cash book, and shows at a glance the entire business transacted by the bank during the day.

This witness testified that the fact that Schardt was permitted to keep the general ledger and act as general bookkeeper in the bank, greatly increased his facilities for embezzling the funds of the bank. (Rec. 32, ques. 16). Also, he was asked: "Would it have been possible for Schardt to have embezzled funds of the bank to any extent without detection if he had not been permitted to keep the general ledger?" The answer is: "It would not have been possible for him to embezzle the funds in the manner he did if he

had not been permitted to keep the general ledger and balance book." (Rec. 33, ques. 20).

It will be observed that what is designated herein as the teller's bond, was given upon the idea that Schardt had been assigned to the office or position of teller and collector (rec. 10), and covers any pecuniary loss which the bank shall sustain in connection with the duties of the said office or position, or with any other duties assigned him by the employer in said service. (Rec. 10.)

This witness was asked concerning a trial balance book, said: "I saw a book of that character when I went in there, but it was incomplete, the balances not entered up, and I paid no attention to it, and I do not know for what years they were taken off." (Rec. 33, ques. 21.)

This trial balance book was left off in 1890, by the orders of Schardt. (Rec. 62, Boensch Dep., ques. 6; ques. 15.)

In the examination of these witnesses, many hypothetical questions were put by the defendant as to how, and whether these embezzlements might have been easily detected had the officers of the bank suspected Schardt, and resorted to them, all of which resulted in negative answers, except as follows: One expert said: "They could, upon any day, at close of business, have taken the daily balance book showing a record of the condition of the bank at the time, and counted the notes on hand, bills receivable, bonds and stocks, and cash, and could then have verified the amount appearing to be upon deposit in other banks to the credit of complainant bank, and this would have only left to be verified the amount shown to be due depositors, and the way to verify this would have been to have taken from the individual ledger a trial balance, which would

have shown the amount due depositors by the bank, and if this had agreed with the amount appearing upon the daily balance book to be due depositors, the officials of the bank would have verified his accounts as clearly as possible." (Rec. 32, ques. 12.) This, he said, should not, in a bank of that size, have taken over twelve hours. (Rec 32, ques. 13.)

The other expert (Jennings), said: "No person not an expert bookkeeper could have found many of those manipulations, but it would not have been difficult for any one who could add columns to have seen some of these false additions, which would have resulted in causing suspicion that some wrong was intended."

Rec. 40, q. 11.

Jennings also testified in respect to the time it would have taken: "Of course it depends upon the rapidity of the work of the bookkeeper. I should think twenty-four to thirty-six hours would be sufficient for an average bookkeeper to do that work." (Rec. 41, ques. 9.)

BY-LAWS OF BANK AS TO DUTIES OF TELLER AS BOOKKEEPER.

"The teller shall also be the general bookkeeper of the bank."

The evidence shows that no system of bookkeeping will detect or prevent embezzlements, including taking trial balances, and that it is not possible to ascertain the finan-

cial condition of a bank without stopping the bank for a time, call in all the pass books, and have an expert go through the whole thing.

Rec. 59, dep. of A. W. Harris.
Rec. 70, dep. of Duncan, q. 33.

The evidence shows that in small banks it is customary for the teller to keep general ledger.

Rec. 68, q. 5, et seq; Rec. 70, q. 27.

It cannot be contended, in view of this contract, that it was wrong to allow Schardt to keep the book known as general ledger, and that Guarantee Company can say successfully that this enabled Schardt to commit and conceal his embezzlements. The contract prepared by the Guarantee Company, and submitted to the bank, is "to make good and reimburse to the employer such pecuniary loss as the employer shall have sustained by the fraudulent acts of the employe in connection with the duties of his said office or position, or with any other duties assigned to him by the employer in the said service."

The proof shows that it is not customary for financial committees, in examinations, to go through original entries on the books, but it is customary for them to accept statements made by cashiers, officers, and clerks.

Duncan dep., Rec. 70, q. 31.
McLaughlin dep., Rec. 67, cross question 2.
A. W. Harris dep., Rec. 60, qq. 3, 4.

There was, at all times, a financial committee consisting of five members; generally, three acted.

The evidence shows conclusively that the finance committee made quarterly examinations into the bank's condition, and also semiannual examinations. The main purpose of the latter was to ascertain the ability of the bank

to pay a dividend. The mode and extent of these examinations are stated differently, but substantially concur. Eatherly says: "Mr. Schardt made out a list of assets of the bank, and that list was taken charge of, generally, by myself and a portion of the finance committee. We went to where the securities were kept, and took them to the director's room, or rear part of the bank, and compared them with the amounts given on the list, to see whether they corresponded. We examined the collateral, or evidences of them to see if they were there. We counted the cash on hand, and had generally a certificate from the banks where we deposited, to the amounts in those. We then compared the footings with the amount as shown on the daily balance sheet or balance book, to see whether they agreed with them. We found no discrepancies except in cash on hand in a few instances. Generally, there was a discrepancy of a few dollars between the money on hand and the amount shown by the daily balance sheet. Sometimes it was a deficit and sometimes a gain, but generally a deficit." (Rec. 42–3, McEwen's Dep., 74.)

This custom was habitual and continuous.

In addition to these quarterly examinations, annual reports were submitted to the directors by the cashier. The president, or some one or more of the directors was present in the bank at all times.

Rec. 43; Rec. 65, qq. 5, 7.

Eatherly admitted that had the finance committee procured from the individual bookkeeper the total amounts shown by his books to be due individual depositors, and compared it with the amount shown by the daily balance book kept by Schardt to be due individual depositors, it

would have disclosed the fact that something was wrong with books.

McEwen testified in respect to these quarterly examinations as follows:

"We counted all the money, or things that represented money, such as cash tickets, checks on other banks, deposits in other banks, and compared this with the statements furnished us by the cashier or teller. Then we took possession of all notes, bills, time or demand loans, or other paper showing an indebtedness to the bank, as well as collaterals, and did our best to ascertain the condition of the paper, and value of collaterals. We compared this with statements furnished by the cashier or teller of what should be in the bank of those kinds of paper, and also compared it with the daily balance book. As we had seen all notes or bills which had been discounted by the bank, and these had been entered on the daily balance book, we would sometimes go back to it. We always took the cashier's or teller's written statement of the deposit account. We hardly ever examined original entries of deposits, but accepted this statement as making a full and fair exhibit of these. We could not have examined original entries. There were several hundred depositors, and a great many small accounts with individuals. It would have taken all our time to have done this, and but few, if any of us, were bookkeepers or accountants. We had to rely upon the honesty of the cashier for this. We did our best to ascertain the exact condition of the bank at the end of each quarter. The finance committee was the discount committee, and all paper approved by the committee was recognized by the committee at the quarterly examination. If we did not remember it we appealed to this book of original entries on the ticket. The quarterly examinations were of the same kind and character which all the banks of Nashville made, as we understood."

Rec. 76 q. 7.

"Every July and January of each year the directors and finance committee made an examination into the affairs of the bank with a view to ascertaining the ability of the bank to pay a dividend. These examinations of the di-

rectors and finance committee were as thorough as we could make them."

Rec. 77. q. 231.
J. B. Richardson dep., Rec. 78.
Rec. 80. q. 3.

The defendant company had a general agent (Cooley) resident in Nashville. It is a part of the duties of this general agent to gather information concerning applicants for bonds, and about persons already bonded in defendant company, and to transmit such information to the home office. To this end the agent employed detectives at discretion, and took information from outside parties.

ARGUMENT IN RESPECT TO TELLER'S BOND.

I.

It is said in argument by my opponent that the bank procured the teller's bond for the year 1892, and all previous years, to be renewed by representing that the employe's books and accounts had been "examined and verified," when in fact, no such thing had been done, and, had it been done, his previous defaults would have been discovered.

I desire just here to clear the case of an obscurity, which may lead to confusion and error.

When the bond was made for the year 1888, it contained the following: "And, whereas, the employer has delivered to the company a certain statement, and it being agreed and understood that such statement constitutes an essential part of the contract herein expressed."

Rec. 10.

The statement there referred to as an essential part of the contract, has no reference to the statement made in the circular, above referred to, stating that the accounts

and books had been "examined and verified," but refers to the statement signed by C. W. Peden, cashier, on pages 86, 87.

Stipulation. Rec., p. 85.

The statement contained in the circular sent out, before the renewals of the bond, to the effect that the books and accounts had been "examined and verified," is no part of the original contract, and is nowhere called for in the contract, or as a condition to its renewal. It was a paper voluntarily sent out from the chief office, at Montreal, and among other things, contained the words ascribed to it on page 85 of the record, and was filled up and signed, and sent back to Montreal. The paper referred to in the body of the bond and as constituting "an essential part of the contract," is the one setting out the questions and answers as shown on pages 86, 87 of record.

II.

I have quoted hereinbefore all the provisions and conditions of the contract, and all the duties and obligations assumed by the bank, as respects this employe, or his books and duties.

The defenses to this suit involve, necessarily, the question of the proper construction of the bonds and rights of the respective parties thereunder, rather than any conflict about the facts.

Here are contracts prepared and printed by the company, which it tenders to the public, by which it undertakes and obligates itself to indemnify and make good to its patrons any pecuniary loss occasioned by reason of the dishonesty of their employes.

The contract implies that employes will have opportunities to embezzle and steal, and that they will not avail themselves of these opportunities, or if they do, the company will make good their thefts and embezzlements to the employer.

These contracts amount to nothing if the conditions and provisos are so arranged by the use of general language, that there cannot be a theft or embezzlement for which a recovery may be had, because the employer gave the employe the opportunity to accomplish it, and to conceal it.

No opportunity to accomplish the theft or embezzlement, or no opportunity to conceal it, when it is accomplished, implies no risk, and reverses the relation of the parties, as assumed in the very purpose of the contract.

The one gives a bond to indemnify and save the other against loss, and the other concedes conditions by which the bond is made practically ineffective for the purpose intended.

The Guarantee Company insures the bank against loss, and, in turn, the bank guarantees that the company shall not suffer loss, because it would give such efficient supervision over the employe and his books as will be sure to prevent loss. Hence, the premium is paid and no risk assumed.

The bond will be construed to give indemnity unless there are unambiguous, clear, and positive words to prevent it. There will be no implication against the purpose of the bond. All risks will be put upon the guarantor, in every respect, unless he has qualified it by apt and unmistakable language clearly intended for and expressive of that purpose.

III.

IS THE RELATION THAT OF SURETY AS GENERALLY UNDERSTOOD?

The Guarantee Company is a compensated guarantor, who, by express contract, undertakes to make indemnity, and to limit his liability. The ordinary surety is not compensated, and usually has no voice in the contract, and makes no limitations upon the extent of his liability. He signs the bond and leaves it to the law to determine the extent of his obligations, and to limit or qualify them accordingly as he has been treated. Hence, it has been held that if the obligee actively conceals facts material for the surety to know, it will operate to discharge him.

Rees v. Benington, 2 Ves. Jr., 540.
2 White & Tudor Lead. Cas., 1106.
Roelton v. Mathews, 10 Clark & F., 934.
Hamilton v. Watson, 12 Clark & F., 109.

In compensated suretyships the latter prepares the contract; in its every detail determines for himself what he desires or cares to know; puts searching questions to this end; makes conditions and provisos as to his ultimate liability. He leaves nothing to the law except the effects of fraud that may be practiced upon him. In these latter days corporations are organized to be, and become compensated guarantors or sureties, for the fidelity of employes. They claim in one aspect to be strict sureties, and when sought to be held liable, invoke to their aid every principle of law or equity applicable to that relation. In another aspect they claim to be *insurers*, and invoke to their aid all the niceties and warranties of insurance law, especially

those regrettable technicalities which recent legislatures have swept away, and which so long perplexed the courts.

Strictly, they are neither the one or the other, but partake of both—are original—and must be dealt with as originals in the future.

IV.

"EXAMINATION AND VERIFICATION."

Our opponents insist that upon each annual renewal of the teller's bond, the company sent out from Montreal a circular to the bank, which it was necessary for some officer of the bank to sign and return, and that among many other things contained in said circular, were the following: "The accounts of said teller (Schardt) had been examined and *verified* by the finance committee," and that this was a condition precedent to the renewal. That, in fact, the account had not been examined and verified; and, therefore, it was a falsehood, and deceived the company in the issuance of the bond, being a material and important fact.

We say that the original contract made all arrangements for these renewals, and fixed in advance the terms and conditions thereof.

Its language is:

"Now, therefore, in consideration of the sum of one hundred dollars, lawful money of the United States of America, to the said company (paid), as a premium for the term of twelve months, ending on the sixteenth day of January, 1889, at twelve o'clock noon, *and in order to effect a continuance of the currency of this bond*, a like premium hereafter to be paid to the said company on or before the sixteenth of January in each year, as a premium

for the ensuing year, so long as said employer may wish to continue this bond, and the said company shall consent to receive said premiums," etc. (Rec. 10.)

Here is no reservation for either party to alter the contract, and no notice that there would be any effort to change it. On the contrary, the parties agree to annual renewals upon "the payment of a like premium *hereafter* to be paid to the said company so long as the said employer may wish to continue this bond, and the said company shall consent to receive said premiums."

Cumulative to the above, the bond recites:

"The following provisions are also to be observed, and binding, as a part of this bond. The actual payment of the premium, and its acceptance by the company, either for the issue or renewal of this bond, is essential to its currency, and a condition precedent to the right or claim hereunder."

Rec. 10.

Again, we have: "That this bond is issued and *renewed* on the express understanding that the employe has not, *within the knowledge of the employer*, at any former period, either in this or any other employment, been guilty of any default or serious dereliction of duty."

The foregoing constitute all the conditions for the annual renewal on the bond. After the expiration of a twelve month, the contract is to be renewed. As respects *time*, a *new* contract is made, but it contains only the terms of the old contract. May says it is generally held to be a new contract upon the terms and conditions stated in the policy expired, the old application, in the absence of evidence to the contrary, serving as a basis of the new contract, and as if made at the date of renewal.

May on Ins., § 70a.

As respects the "examination and verification" of the books or accounts of this office, not one word is said in the original bond. I now quote what it does say:

"That there shall be an inspection or audit of the accounts or books of the employe on behalf of the employer at least once in every twelve months from the date of this bond."

The company had put a number of questions to the officers of the bank, which were to be, and were, answered, to ascertain, before taking the risk, the habits of the bank in respect to these very matters, such as "when was the last *inspection* of the office?" "What is your custom in regard to the frequency of *inspection*?" "Are they at stated periods or irregular?" and "What is the longest time allowed to elapse between inspections?" "Has the bank a duly and authorized inspector? If not, by whom are the inspections made?" "In the event of the employe filling the post of teller, how often, and by what officer will the teller's cash be checked and counted." And to conclude it all, the contract declared in express words: "That there shall be an inspection or audit of the accounts or books of the employe, on behalf of the employer, at least once in every twelve months from the date of this bond."

This circular, which contains the words, "examination and verification," it is now claimed requires more of the bank than was required by the original contract, or than is expressed by the words, "inspection or audit," and an effort is thus made to alter the contract in a sidewise, unadvised, and unconscionable manner.

Our contention is, that under this contract the bank was required to do certain things in respect to the books

and accounts of its teller, and these things, we claim, it did, and this contract was to continue from year to year, upon the payment of the premiums, so long as the one paid and the other accepted it. At the end of the year, and when the bank had determined to continue the contract for another year, and to pay the premium, this paper, not purporting to change the contract or the duties of the bank, then past and ended, came to the bank, and hidden in it are the words, that the teller's accounts had been "examined and verified" by the finance committee, whatever these words mean. We insist that said statement in respect to "verification," was not a condition of the original contract, as set out in the bond or guaranty; was not called for therein as a condition precedent to renewal, but was intended as a catch, slyly and cunningly devised to defeat ultimate liability, and to entrap the unwary.

We further contend that the words of the original contract are the contracting and controlling words of the parties, measured by each before executing the contract, and fixed forever their rights and duties under *that* contract so long as it existed, as between themselves, and that its legal effect was not to add anything to the contract as a condition or provision, but should be construed in connection with and to have reference to the words, "inspection or audit," as set out in the original contract. That having required the bank to perform specific duties in the original contract, it cannot subsequently limit its liability and defeat the entire contract by requiring the bank to do those same things by using stronger words, or increasing the bank's duties beyond its original contract. Nowhere in the original contract had it exacted of the bank a "*verification*" of the accounts of the teller. "Verification," as

now contended for, means such an examination and comparison, inspection and scrutiny of the books and accounts of the teller as would detect any embezzlements, however cunningly contrived or hidden upon the face of the books. If these companies will make it apparent or visible upon the face of the contract what is now and here contended for, they will quit the field of competition for business and patronage quite soon.

The condition of the original contract, and of each renewal was: "That there shall be an *inspection* or *audit* of the accounts or books of the employe, on behalf of the employer, at least once in every twelve months from the date of this bond." (Rec. 11.) This is what the bank agreed to do, and this is what it understood it was certifying it had done. It is argued here as if the bank had made a contract for such effective and absolute supervision as would detect and prevent abstractions of its funds, and in this circular, solemnly certified that it had done so, and the bond was renewed on the faith of this statement, as if it was a guaranty on the part of the bank that the past was forever closed, and that the bank had somehow estopped itself from looking into past embezzlements, and that it would be a fraud on its part to insist thereafter that there were or had been embezzlements.

The court will observe that the very words of the contract put the only limitation upon retro-examination and discoveries in this language: "Committed by him and discovered during the continuance of this bond, and within six months from the employe ceasing to be in said service" (Rec. 10), showing thereby that back inspection of the books of the employe were intended, notwithstanding a renewal in the meantime. The effect of the contention of our

opponents, in view of all the facts, is this: The bank agreed to make an "inspection or audit" once in every twelve months, and then at the end of the twelve months, to make the bank say that it had "examined and verified."

V.

ASSIGNMENT OF ERROR ON TELLER'S BOND.

The first assignment is made on the agreement of the bank to notify the company on becoming aware of the employe being engaged in speculation, and it is claimed that the bank learned that the employe had not only been speculating, but had been a part owner in a gambling concern, and neither investigated the matter on its own account nor notified the company.

This assignment is based upon a condition in the bond, as follows:

"That the *employer* shall at once notify the company on his becoming aware of the said employe being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits." (Rec. 11.)

The proof on this, is, that Eatherly, a director in the bank, saw an anonymous letter addressed to Woodward, in which it was stated that "Schardt was a partner in a bucket shop." He showed the letter to Schardt, who said, "It is a lie, and I can prove it," and went out and returned with Scaright and Barry, saying, "Here are the men who can tell you whether that is true or not." It resulted in this. Scaright said: "Some time before that, Schardt Barry, and he had agreed to open a brokerage association. Each one was to put in $200. Schardt, in a short time,

became dissatisfied,and sold his interest to Searight at a small loss." This anonymous letter was just prior to the resignation of Judge Woodard. Woodard's resignation bears date of February 17, 1893, and was accepted March 25, 1893.

So it is doubtful, so far as this witness is concerned, whether any of this matter relates to the time the teller's bond was in force.

This proves that he took stock in a brokerage association to the amount of $200, and sold out at a small loss.

A brokerage association neither buys or sells for itself, and is but the broker or agent of others, engaged in speculation on the boards of other cities.

Brokerage associations are lawful in the State of Tennessee, and are duly licensed. (See appendix for acts of legislature.)

To prove that a man was a stockholder in a brokerage association does not necessarily prove that he was speculating or gambling or indulging in any disreputable or unlawful habits.

"Purchase and sales of stocks by an officer in a bank is not ipso facto evidence of dishonesty, but if such officer be engaged in stock gambling, or buying and selling beyond his means, he should not be continued in a place of trust."

Scott v. National Bank, 72 Pa. St., 471.

The other witness called to prove that Schardt speculated, was Sykes, the cashier, and acted as such during the year 1892, and who recommended Schardt as his successor, and who had litigation with the bank at the time his deposition was taken. He testified that a man named Kyle, who represented Myers & Co., of New York, told him in the summer or fall of 1892, that Schardt was a part owner

in a brokerage association, and that he told Schardt what Kyle had told him, and that Schardt admitted that "he, at one time, had been interested in such a concern but had sold his interest." Sykes also testified that Schardt told him that "he had speculated to some extent, but made money." He also refers to the anonymous letter. That he told Baxter, the President, of these things.

Do the foregoing constitute "becoming aware?" The word "aware" is not used here in the sense of "heard," as in the cashier's bond. "Aware" is universally defined as "possessing knowledge," "conscious," "cognizant," "informed through the senses," and is a synonym of "certain," "certified," "sure."

This court held that a provision like the foregoing, "requiring written notice to the obligor of any act of the cashier involving loss to the bank, to be given as soon as practicable after the bank had knowledge of such act, does not require notice upon suspicion, but only after the bank has knowledge of such *facts* as would justify the charge of fraud and dishonesty against the cashier."

American Surety Co. v. Pauly, 170 U.S. 131 (42 L. C. P. Co., 977).

"Being engaged in speculation or gambling or indulging in any disreputable or unlawful habits or pursuits," certainly implies some continuing and substantial manner, either as to *time* of its continuance, or magnitude of the transactions, not to one or two, or even more times.

"Being engaged," is not the same as having been engaged. The one is present tense, the other a past fact when first heard of.

It is quite clear that the bank was not obligated under this contract, or independently of it, to ransack Schardt's

past life, or to run down rumors and suspicions and report them to the Guarantee Company. It had its agent at Nashville to do this character of work.

State v. Atherton, 40 Mo., 207 (1 C. C. A.).

The insistence of the Guarantee Company is that "becoming aware," is synonymous with "having heard," "rumor," "suspicions," and "being engaged," means in this contract "having been engaged," in the indefinite past.

There is no doubt that Schardt took a very large amount of money from this bank, but that he ever had what is commonly known as a gambling transaction, or that he ever indulged in any disreputable or unlawful habits, or lost a dollar in speculation, has not been shown in this record. It is to-day a surmise what he did with it, and not a fact, but an inference, that he lost it in speculations somewhere and at some time.

VI.

The next error assigned is:

The bank procured the teller's bond to be renewed in January, 1892, by representing that the employe's books and accounts had been examined and verified when the books showed a default of $23,365.14 in a bank with a capital of only $50,000.

I have disposed of this assignment heretofore. See page 17 to page 22, so far as it relates to the words "examined and verified," and what is not heretofore disposed of will be discussed with the next assignment.

VII.

The third assignment is:

The bank agreed to observe, or cause to be observed, all due and customary supervision over the said employe for the prevention of default, and during the currency of the bond, ceased to compare ledger balances, or correctly count the notes held by the bank, which was not only customary with other banks, but was customary in this bank up to the time this shortage commenced.

This assignment is based upon the following condition of the bond:

"That the employer shall observe, or cause to be observed, all due and customary supervision over the said employe for the prevention of defaults, and if the employer shall, at any time during the currency of this bond, condone any act or default on the part of the employe, which would give the employer the right to claim hereunder, and shall continue the employe in his service, without notification to the company, the said company will not be responsible hereunder for any default which may occur subsequent to said act or default of said employe so condoned."

This is another very broad and indefinite expression, an is reasonably susceptible of several interpretations. It is contended on the part of the Guarantee Company that it has but one meaning, and this is, that it relates to the books and accounts kept by the employe, and is a covenant on the part of the bank that it will keep the same character of books, and keep them in the same manner as is customary with other banks, and thereupon, it proceeds to show that it had been the custom of this bank, up to 1890, to compare ledger balances and take off trial bal-

ances as often as every thirty days, and thereafter it ceased, and, in this connection, it says that this custom universally prevailed in other banks, and it concludes by insisting that this failure, in this particular, avoids the bond, because it was a failure "to observe all due and customary supervision of the said employe to prevent defaults." If this condition be taken, literally, it has no reference to the books of the bank. The words are "due and customary supervision over the employe." It does not say over the books kept by him, or over the work done by him, but over him personally, as respects his habits, association, as well as his prompt and daily presence at the usual and customary hours. The balance of the sentence is consistent with this view, and is inconsistent with the contention of the Guarantee Company, in that it relates to condonements and personal matters as distinguished from books and methods of bookkeeping.

Again, the company had made inquiry and been told all it desired to know in respect to the books, *i. e.*, when inspected, by whom inspected, and had put its ultimatum to the effect that they should be *inspected* at least once in every twelve months. It made no objection to what had been told it. It prescribed no methods of bookkeeping. It did not prescribe the extent and vigilance of the prescribed supervision, how it should be done, and what would be expected or required. Besides, the Guarantee Company had been told, in the application or declaration, that there would be an "inspection or audit" of the books and accounts of this employe once in every three months, and that it would be made by the finance committee. The only limitation upon the liability of the Guarantee Com-

pany should be found in the clear and unambiguous language of its contract. Indemnity was the purpose of the contract, indemnity was what the premium was paid for, and there should be no inference against indemnity.

In the case of an ordinary surety upon the bond of an officer of a bank, it has been held "that negligence of the officers of a bank, in failing to examine the books and to discover the defalcations of the paying teller, does not release the sureties on his bond, given for the faithful performance of his duties."

Lieberman v. First National Bank, 40 Atl., 382.
Bank v. Root, 2 Metc. (Mass.), 540, by Shaw, C. J.
Taply v. Martin, 116 Mass., 275.
Bank v. Stephens, 39 Me., 532.
Farmington v. Stanley, 60 Me., 472.
United States v. Kirkpatrick, 9 Wheaton, 72.
Wayne v. Bank, 52 Pa. St., 343.
Phillips v. Bossard, 35 Fed. Rep., 100.
Sparks v. Bank, 3 Del Ch., 302.

Graves v. Bank, 10 Bush (Ky.), 23, has been overruled in every case in which it has been discussed, and stands alone and unsupported.

Lieberman v. First National Bank, 40 Atl., 386.
Bank v. Albee, 63 N. H., 161.

VIII.

FOURTH ERROR ASSIGNED ON TELLER'S BOND.

The bond provided that there should be an inspection or audit of the accounts and books of the employe, on behalf of the employer, at least once every twelve months. Yet the ledger balances were not computed, and the notes in the bank were not counted or compared with the amount called for by the books.

Rec., 14.

This assignment is based upon the following condition of the teller's bond:

"That there shall be an inspection or audit of the accounts or books of the employe, on behalf of the employer, at least once in every twelve months from the date of this bond."

This assignment is not well taken in point of fact—that there was an inspection or audit, as the bank officers understood these words, every three months, and also twice a year, additionally, there can be no doubt.

The real point of this complaint is that these examinations made by finance committee into the condition of the bank, were too superficial to meet the requirements of the bond. It is claimed and insisted that they did not amount to either an "inspection or audit," as these words are understood in the bond, and in proof of this, we are referred to the fact that original entries on the books were fraudulent; that the books were full of false additions and other frauds which a more expert and scrutinizing inspection might and would have detected. Since the experts have taken charge of the books of the bank and called in all pass books from the hands of depositors, and spent several months exploring original entries, uncovering those which were false, pointing out the false additions made in long columns of figures, and shown failures to enter upon the books moneys collected, and how, after making a false entry on one book, he would falsify entries on other books in order to make them correspond as a whole, it is quite easy now to see how these frauds might have been detected by the committee, and how apparently negligent the finance committee must have

been not to have discovered them. It is not the business or duty of directors to go back to original entries.

Briggs v. Spaulding, 141 U.S., 132.

Ex post facto wisdom enlarges and sharpens our retrospective vision, so that, in every backward glance we see things lying near to us upon the very surface, the existence of which we never suspected.

The argument of our opponents is that the books of the bank had hidden under their surface every fact now brought to light, which were as open to the discovery of the finance committee as to the experts, and had the committee made a sufficiently rigid and close scrutiny, they, too, could have made the discovery; *ergo*, the bank did not make the contemplated inspection or audit. "This," said the Court of Appeals, "is substantially construing the contract as a guaranty to the defendant company against the bank's carelessness in making the examination," and I might add, as guaranteeing to the company that each inspection or audit closed the matter forever to that date.

Insurance is taken to secure the insured against his own negligence or inexpertness, as well as that of his agents and servants. It is nowhere contradicted that these inspections or audits, wherever made, should be infallible. If so, there would be little necessity for insurance.

It is said that it contributed to the teller's opportunities to embezzle successfully and avoid detection, by allowing him to discontinue, in 1890, the trial balance book. I do not understand, if original entries were false in one book, and all the other books were made to conform to this, how a trial balance taken from these false entries would have detected anything. The company undertook to guarantee

to the bank Schardt's honesty and fidelity to his trust, and especially, that he would not embezzle the funds of the bank, even should he have an opportunity to do so. It seems now probable that Schardt dropped the use of the trial balance book as a part of his scheme to embezzle the funds of the bank, or because of the additional labor it would require to make it conform to the others. At all events, the honesty and fidelity of Schardt was the fact insured; not honesty so hedged about that he could not be dishonest; not honesty compelled and *enforced* by active and sleepless vigilance; not a species of honesty or fidelity secured by an impending threat that an expert bookkeeper would supervise his books, at a greater expense to the bank than the premium paid annually for this insurance.

It is universally known that there are two modes of inspecting the condition of a bank. The one is that made by the committee of the bank, which never goes to original entries, never adds up columns or calls in pass books, but accepts as correct reports made to it by the cashier, purporting to be taken from original entries. The other is made by expert bookkeepers, who do go to original entries, who make comparisons of the entries made in various books, and which should bear upon each other, which add up columns. The latter, too, calls in all pass books of depositors, and compares entries made in them with corresponding entries upon the individual ledger.

The representations made in the application in this case disclosed to the Guarantee Company that inspections had always been made by the finance committee, and this would be the custom in the future. And no objection was made. It is fair to infer that the Guarantee Company knew that the committees, especially the finance committee, which

had charge of supervision and discounts, was made up of the largest stockholders, or persons largely interested in finances and success of the bank, and were willing to leave to it to make such inspections as their interest would dictate. The Circuit Judge, Clark, held on this point that "so long as the bank officers and the committee acted in good faith, such examinations as the appointed committee thought proper and sufficient for the protection of the bank and its stockholders, would satisfy the requirements of this contract. If anything more was wanted, it was a matter for specific agreement."

The principle announced in American Surety Co. v. Pauly, 170 U. S., 160, that "when a contract is so drawn as to leave room for two constructions of its provisions, it must be interpreted most strongly against the party who prepared it, and delivered to the other party for his protection."

IX.

IN THE MATTER OF THE CASHIER'S BOND.

The cashier's bond constituted Exhibit A to the original bill, and is set out from pages 5 to 9, of transcript—is in the penal sum of $20,000, and is dated January 1, 1893. The annual premium of $100 was paid. This premium carried the bond to January 1, 1894.

This bond was only in existence from January 1, 1893, to April 17, 1893, when Schardt died.

The amount claimed upon this bond is $22,964.17 of principal, and $164.52 interest, aggregating $23,128.69.

This sum was taken between January 16, 1893, to death of Schardt, in April following.

The bond recites that:

"Whereas, the said employe has been appointed cashier at Nashville, Tenn., in the service of said employer, and has been required to furnish security that he shall not be guilty of any *fraudulent* act in the performance of his duties in said capacity, by which the said employer shall suffer any pecuniary loss."

Later, by recitation, the bond undertakes to limit the liability of the Guarantee Company, "to any act of fraud committed by the said employe in connection with the duties of said appointment, and constituting embezzlement or larceny."

This bond contains, also, the following:

"Said company fully relying on the truth of the statement and declaration contained in a certain document distinguished as employer's guarantee proposal No. 154,806, dated the 10th of January, 1893, and signed, Lewis T. Baxter, President, on behalf of said employer, and lodged with the said company at its office in Montreal, and in the strict performance and observance hereafter by the said employer of the contract thereby created, do hereby," etc.

Said bond also contains the following:

"Provided, always, that this bond and guarantee hereby granted or undertaken shall be subject and liable to the terms and conditions hereupon indorsed."

I shall notice only such terms and conditions as are supposed to be material to this lawsuit, and omit all others:

"1. Any misstatement of a material fact in the declaration within mentioned, in any claim made under the bond, will render the bond void from the beginning.

"2. That said employer shall use all due and customary diligence in the supervision of said employe for the prevention of a default, and to that end shall cause an inspection or audit of his accounts to be made at least once in twelve months, and if the said employer shall, at any time during the currency of this bond, become aware of any act or default on the part of such employe, which would constitute a claim hereunder, and shall continue said employe in his service, without notification to the said company, the said company will not be responsible hereunder for any loss or default which may occur subsequent to said act or default of said employe.

"3. That any written answers or statements made by, or on behalf of said employer in regard to, or in connection with the conduct, duties, accounts, or methods of supervision of the said employe, delivered to the company either prior to the issue of this bond, or any renewal thereof, or at any time during its currency, shall be held to be a warranty thereof, and form a basis of this guarantee, or of its continuance.

"4. That the said employe has not, to the *knowledge* of said employer, been guilty of any serious dereliction of duty or default in this, or any other service, or that his habits have been such as to incur said employer's censure previous to the issue of this bond.

"6. This bond shall extend to cover only such losses as may have been incurred by reason of the *fraud* of the said employe during the currency of this bond, and within twelve months previous to the notification to said company of any default hereunder."

This cashier's bond was issued upon what is called employer's guarantee proposal No. 154,806, and which is signed by Lewis T. Baxter. I now quote from this all the questions and answers supposed to be material to this suit, omitting all immaterial.

Rec., 89.

"Ques. 3. Has he ever been in arrears or default in the bank's service, or, as far as you have heard in any previous employment?

"Ans. No.

"Ques. 4. Have you known or heard of anything unfavorable as to his habits or associations, past or present, or of any matters concerning him about which you deem it advisable for the company to make inquiry?

"Ans. No.

"Ques. 13. When were applicant's books and accounts, including cash, securities, and vouchers (if any) last examined, and by whom?

"Ans. December 31, 1892, by finance committee (where they found correct), of bank, and found correct.

"Ques. 14. In case of applicant's handling cash or securities, how often will the same be examined and compared with the books, accounts, and vouchers, and by whom?

"Ans. Not less than quarterly, and often monthly, by finance committee.

"Ques. 16. Will applicant handle funds or securities not subject to routine check or periodical examinations? If so, please describe their nature.

"Ans. No."

All the above and many other questions and answers are concluded by this general printed language:

"The above answers and representations are true to the best of my knowledge and belief." Dated January 10th, 1893. Signed. "Lewis T. Baxter. Official title, President."

The assignment of error made in this court in respect to this bond are set out on page 14 of brief of defendant in error (omitting many set out in the record before the Court of Appeals but not renewed in this court), and are as follows:

1 The bank represented that it did not know of, and had not heard of anything unfavorable as to his habits or associations, past or present, of the employe upon whom it was seeking the issuance of the bond, yet, at the time the bank and the particular officer making the statement for the bank, knew that the employe had been engaged in speculation, and had been a partner in a gambling concern

while occupying a position of trust in the bank, and no effort was made to verify his statement that he had sold out his interest in the bucket shop, and had ceased speculating.

2. The bank procured the issuance of the cashier's bond by representing that the books and accounts of the employe, who had been its teller for five years, had been examined and found correct to the end of his term of office; yet, at that time, the books and accounts of the bank showed a default of $73,715.44, in a bank with a capital of only $50,000.

3. The court allowed $5,992.12 of overdrafts "allowed but not authorized," as a part of the default for which the company was liable, although the bond only protected the bank against a default "constituting embezzlement or larceny."

The court perceives that this bond makes an effort to create a *warranty* in respects of all written statements or answers made by Baxter, "in regard to, or in connection with the conduct, duties, accounts, or methods of supervision of said employe prior to the issue of this bond."

The superadded words that the facts are true "to the best of insured knowledge," imply a wilful untruth to avoid the policy.

1 Biddle on Ins., sec. 562, citing
Clapp v. Mass. Benef. Asso'n, 146 Mass., 519.
United Breth., etc., v. Kinter, citing France v. Ætna Ins. Co., 94 U. S., 561; Ins. Co. v. Gridly, 100 U. S., 614, and other cases.
National Bank v. Ins. Co., 95 U. S. 673.

Applying the principles of law to the facts, we have this:

To the question:

"Has he ever been in arrears or default in the bank's service, or as far as you have heard in any previous employment?"

The answer is:

"No, to the best of my knowledge and belief."

So, with reference to the fourth question, whether he had known or heard anything unfavorable as to his "habits or associations," or any matters concerning him about which you deem it advisable for the company to make inquiry?"

The answer is:

"No, to the best of my knowledge and belief," and so on, as respects the other questions, viz: 13th and 16th.

The proof abundantly shows that Schardt's habits and associations, as far as the community knew, were good, and that he was esteemed a model man.

Suppose Baxter had heard through an anonymous letter that Schardt had, at one time, owned stock in a brokerage association, or that he had one or more transactions in speculation. These cannot be said to constitute habits, or create "associations."

> Ætna Ins. Co. v. Davey, 123 U. S., 739.
> 3 Joyce on Ins., sec. 2076.

Bearing on this point, we must look to that condition of the bond relating to this same matter, and read it in connection with the questions and answers, as quoted above. It reads: "That the said employe has not, to the knowledge or belief of said employer, been guilty of any serious dereliction of duty or default in this or any other service, or that his habits have been such as to incur employer's censure previous to the issue of this bond."

The question called for Baxter's personal "knowledge and belief." He had no *knowledge* is certain, and he said that he had no belief, "which he deemed it advisable for

the company to make inquiry about." The argument is that he should, in view of the statements of the anonymous letter, and what Sykes says he told him, have a belief, and that the court should hold that he did have a belief. The Guarantee Company selected Baxter as the person to answer the questions, and sought his personal belief, as they might have selected the sheriff, or any other public man, to give it the benefit of his knowledge and belief. The correspondence is addressed to "Lewis T. Baxter, pt., managing director Mechanics' Savings Bank & Trust Co., Nashville, Tenn," and requested such information as "*you* deem it advisable." The argument of our opponents goes upon the theory, that, by reason of all this, Baxter became, in some way a detective for the Guarantee Company, and that it was his or the bank's duty to run down to a positive affirmation or denial, every loose rumor in respect to their employe, no matter how ignoble the source and vehicle of the information.

Representations, expectations, belief or opinion without fraud, do not avoid a policy.

2 Joyce on Ins., secs. 1903, 1904, and cases cited.
Beham v. United Guarantee Co, 7 Exch., 744.
21 L. J. Ex., 317.

X.

The next assignment of error on the bond of the cashier is quite a broad statement of the facts. It is:

"The bank procured the issuance of the cashier's bond by representing that the books and accounts of the employe, who had been its teller for five years, had been examined and found correct to the end of his term of office; yet, at that time the books and accounts of the bank showed

a default of $73,715.44, in a bank with a capital of only $50,000."

All the foregoing is based upon question 13 and answer thereto, propounded to Baxter by the Guarantee Company, under the circumstances and qualifications stated hereinbefore:

"When was applicant's books and accounts, including cash), securities, and vouchers (if any) last examined, and by whom?

"Ans. December 31, 1892, by finance committee (where they found correct) of bank and found correct."

Rec., 89.

This answer was given under the qualification, "to the best of my knowledge and belief." The proof abundantly shows that the books and accounts had been examined December 31, 1892, by the finance committee, and found and reported correct by that committee. This complaint is directed—not to the fact, but to the mode and thoroughness of that examination. This we have presented heretofore, on the same question made in respect to the teller's bond, and to which we refer the court.

XI.

$5,992.35 OF OVERDRAFTS.

It is said that this item should not be allowed as a charge against the Guarantee Company, on the bond of the cashier. Solicitors for the company say: "This may have constituted a fraudulent act of the employe (Schardt), but it certainly cannot be either embezzlement or larceny."

We have several replies to this:

First. Every item of embezzlement and larceny making up the large sum reported by the experts, was set out in what is known in the record as Exhibit X to the bill, and was a part thereof. Said Exhibit X only purports to show the *embezzlements and larcenies* of the cashier and teller. It makes no effort to exhibit any item that had been honestly dealt with, as shown by the books. Said exhibit occupies about six pages of closely printed figures in the record. (See Rec., pages 13 to 18, inclusive), and includes probably a little less than eight hundred items of money, varying in amounts. It took the experts some seven months to go through the books of the bank and cull out these dishonest items from the great mass of honest transactions.

An inspection of the exhibit shows that the experts set out the date of the dishonest transaction, the amount thereof, how it was accomplished; in brief, citing the book and page where and on which the item could be found. This exhibit was made a part of the bill. I will state just here that the Guarantee Company had been asked to put in an expert bookkeeper to assist in making out the exhibit, and declined to do so. Also the widow and administrator of Schardt had been likewise requested, and had done so.

This Exhibit X shows the default of Schardt, as cashier, to be $22,817.30, of which said item of $5,992.35 constituted a part. This exhibit X constituted the proof of loss made to the Guarantee Company.

The following is the language of the bill:

"Complanant now charges that said Schardt, as such cashier, and during the currency of said bond, did, as shown by the report of said expert accountants and book keepers, and did, in fact, by acts of fraud committed by him in connection with the duties of his said office, and constituting embezzlement or larceny, take of said bank

and appropriate to his own use, the sum of $22,817.30 without interest, and for which complainant is entitled to reimbursement under the terms and conditions of said bond."

The bill then proceeds to state that it did give notice, "and make the proof of the facts to said Guarantee Company."

While this Exhibit X was filed in court as a part of the bill, and a copy thereof in the hands of the Guarantee Company, and its solicitors, it filed its answer, stating as follows:

"Respondent admits that after said bank made its assignment to said Pryor, its affairs were examined, and it was discovered that said Schardt had *abstracted* from said bank a large amount of its money, a part of which was *abstracted* in the year 1890, a part in 1891, part in 1892, and a part in 1893, but the respondent does not admit that the amounts *embezzled* in each year are correctly stated in the bill," thus showing that defendant knew that every item of Exhibit X was charged as embezzlement.

The answer does not raise any issue on any item in said exhibit, or make the point now made, that the taking did not amount to an *embezzlement* or *larceny*. With the exhibit before defendant, the question should have been raised either in the answer, or certainly in the examination of witnesses, who testified to the correctness of the items in said exhibit, as embezzlement or larcenies.

It is evident to the court that Exhibit X was the basis for the examination of the expert witnesses, and that it was not necessary to ask these witnesses if Schardt had em-

bezzled or stolen such items eo nomine. The witnesses, the parties, and the attorneys went upon the theory that this exhibit contained the entire claim of complainant, and that each item was embezzlement or larceny. The experts headed the exhibit with these words: "Statement of shortage of John Schardt, cashier and teller of the Mechanics' Savings Bank & Trust Co."

The examination of the witnesses who made this exhibit, both original and cross, proceed upon the theory that "shortage" meant embezzlement or larcenies. Sometimes the word, "defaulter" is used. I give samples of the original and cross-examination:

Ques. 4, of McEwin. Witness was asked with reference to each and every one of the several hundred items of said exhibit: "Please state what was the character of these defaults, and of what did they consist as respects detention?

"Ans. They were extractions from the funds of the bank, made by Schardt, and were evidenced by the books kept by him, and covered on the books kept by him from detection.

"Ques. 5. Please state whether these abstractions or embezzlements were easily or readily detectible? etc.

"Ques. 7. How long were the bookkeepers and you engaged in ascertaining these abstractions?

"Ques. 9. In order to ascertain the facts of embezzlement of the funds of the bank? etc.

"Ques. 12. Please state whether the amounts, as stated above by you, were taken from the funds of the bank?

"Ans. These amounts mentioned were abstracted by John Schardt, etc."

On the cross-examination of this witness, the attorney for the company, Mr. Granbery, proceeding upon the idea that every item in Exhibit X was an embezzlement or larceny:

"Cross question 15. Please furnish statement marked

Exhibit 4, showing, in detail, the amount embezzled in each particular year, and each method."

The witness did so. It is alone in this Exhibit 4 that the aggregate of embezzlements, viz.: $5,992.35, done by means of overdrafts, first appears.

Record, p. 39.

In Exhibit X, each item of embezzlement is set out, but this does not, in every instance, show how it was done. Our friends on the other side wanted an exhibit showing, in brief, the amounts embezzled in each particular year, and the method by which each was accomplished. In this he was accommodated, said exhibits showing the amount of embezzlements each year, and the method by which it was done, such as "failure to credit deposit," "manipulating individual deposit," "failure to credit notes collected," "failure to enter deposit," etc., and then the items of $5,992.35, and the method by which it was done is stated to be "overdrafts allowed and not authorized." Our opponent's question called for embezzlement, and the method by which it was accomplished. Now he seizes upon the method set out in the answer to show that it was not an embezzlement, but was money obtained in some mode discreditable, or otherwise, not amounting to an embezzlement.

I refer the court to the questions and answers of Prof. Jennings, who helped make out Exhibit X, and who, in response to the question, what was the result of the examination, said:

"I examined the books from September 9, 1890, to April, 1893, finding John Schardt's shortage during that time as teller and cashier, including interest, to be $107,-

182.12." He then sets out the amount for each year, and adds: "As cashier from January 1, 1893, to April 17, 1893, $22,964.17, and this item of $5,992.35, is included to make that sum."

Jennings stated the shortage of Schardt, as cashier, to be $22,964.17. He was then asked question 4:

"From whom had the money been taken or abstracted?

"Ans. From complainant bank.

"Ques. 5. Was the fact shown by books kept by Schardt, or which were under his care and keeping?

"Ans. Yes.

"Ques. 6. Was it shown to be money taken, or other valuables?

"Ans. As money taken.

"Ques. 7. How was Schardt shown to be connected with the embezzlement?

"Ans. The manipulations on the books were all shown to be in his handwriting."

The record abundantly shows that the whole testimony was taken upon the theory that Exhibit X showed only items of embezzlement or larceny.

On the trial and in the argument before the Circuit Judge (Clark), no such point was made, as the opinion reported in 68 Fed. Rep. shows. After Judge Clark had decided the case, and directed judgment to be entered for complainant, and the decree was prepared and submitted to the court, on July 1, 1895, the attorney for the company for the first time called the attention of the court to this item, pointing out the present objection by error which he assigned August 1, 1895.

Neither the bill or the testimony made effort to hold Schardt or the company liable for "overdrafts," as such, but only for embezzlements or larcenies, but if Schardt made an overdraft on the bank in the name and behalf of

another party, and without the knowledge of such party, or the bank, and himself took the proceeds and used them, it would be larceny or embezzlement on the part of Schardt, and the fact that it was called an "overdraft" by the experts would not make it a legitimate transaction, or deprive the transaction of its felonious character. Especially would this be true when the experts were asked to state the amount embezzled, and the method used by the embezzler.

The question concludes the particular criminality as that of embezzlement, and shows that the method by which it was accomplished was by overdraft.

This point was not made before the trial judge, and it was too late to assign it as error in the Court of Appeals, or in this court.

Danforth Dig., Vol. I., p. 1047, where all the cases are collected.
Marine Bank v. Fulton, 2 Wall., 252.

It is too late to present the question for the first time on a motion for a new trial.

Reagin v. Aiken, 138 U. S. 110.
Pacific Express Co. v. Malen, 132 U. S., 531.

We insist that under the rules of interpretation governing contracts of this character, that the bank would have the right of recovery for this item of $5,992.35, because of the ambiguity of the bond in its entirety, and that the Guarantee Company cannot insist that the act of fraud must amount to a technical "embezzlement" or "larceny."

The bond declares: "Whereas, the said employe has been appointed cashier at Nashville, Tenn., in the service of said employer, and has been required to furnish security that he shall not be guilty of any fraudulent act in the performance of his duties in the said capacity, by which the said employer shall suffer pecuniary loss; and, whereas,"

etc. Later, and after many recitations in which the mind of the reader, especially of a layman, would have lost the connection, it says, it covenants "to reimburse unto said employer, or his or their representative or assigns, the amount of any loss, not exceeding in the whole the sum of twenty thousand dollars, which, during the currency of this bond, shall be sustained by the said employer by reason of any act of fraud committed by the said employe in connection with the duties of said appointment, and constituting embezzlement or larceny."

The sixth condition provides:

"This bond shall extend to cover only such losses as may may have been incurred by reason of the fraud of the said employe during the currency and within twelve months previous to the notification to the said company of any default hereunder."

It is no answer to say, that, while the bond is ambiguous in respect to what acts the Guarantee Company will be liable for, in one place saying, "fraudulent acts, etc., by which the said employer shall suffer pecuniary loss;" at another place saying, "any acts of fraud, etc., constituting embezzlement or larceny," and at another place saying: "This bond shall extend to cover only such losse as may have been incurred by reason of the fraud of the said employe during the currency of this bond, and within twelve months," etc.

It will doubtless be replied to this that the first relates to the scope and obligations which the Guarantee Company is about to assume; that the next insertion relates to what it actually contracts to do, and that the third and last is a condition on the back of the bond relating to a limitation. It will not be denied, however, that the bond as a

whole is ambiguous on this point, when read by the public generally, for whom it was intended.

This court has uniformly held:

"If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond is given, must be adopted, and for the reason that the instrument which the court is invited to interpret, was drawn by the attorneys, officers, or agents of the surety company."

American Surety Co. v. Pauly, 170 U. S., 133.
Imperial Fire Ins. Co. v. Core, 151 U. S., 452.

This bond more than once professes and pretends to secure the bank against loss by reason of the "fraud" and "fraudulent acts" of the employe, without regard to the technical criminal offense committed, and the public asked to accept it. The public have little or no concern, and less knowledge, of what constitutes the elements of larceny, embezzlement, or fraudulent breaches of trust, or kindred crimes which go to make up the criminal laws of the country. The public wants indemnity against the wrongful and frudulent appropriation and taking of money by parties intrusted, necessarily, with its custody and handling, as clerks, officers, etc., and to meet this want these bonds are made, accepted, paid for, and relied upon, and to this end they should be construed, unless there is a clear, unambiguous, and positive interdiction not reached by ingenious construction, but by the necessity of the very words used.

If the one part of the contract contradicts another part, then interpret the whole contract by the general purpose for which the contract has been made and entered into.

EDWARD H. EAST, *Attorney.*

APPENDIX.

VARIOUS ACTS OF THE LEGISLATURE OF TENNESSEE LICENSING DEALINGS IN FUTURES.

ACTS OF 1887 (phamplet act), CH. 1, P. 13.

After naming the various and different occupations licensed, it says:

"FUTURES.

"Each person, firm, company, or corporation dealing therein, and each branch or agency of such firm, company, or corporation, per annum, $1,000."

ACTS OF 1889, CH. 130, P. 247.

"FUTURES.

"Dealers in futures, and brokers dealing in futures, whether actual delivery is intended or not, each person, firm, company, or corporation dealing or doing a brokerage association therein, and each branch or agency of such company or corporation in cities, taxing districts, or towns of thirty thousand inhabitants or over, per annum, $1,000."

This act then grades the amount of the license, according to population, of all towns under thirty thousand.

ACTS OF 1891, CH. 25, P. 50.

This act is the same as the Act of 1889, set out above.

ACTS OF 1893, CH. 89, P. 131.

This act is the same as the Act of 1889, Ch. 130, set above.

There is a proviso to this act to the effect that it shall not be construed to amend, repeal, or modify the criminal laws of the state. Approved April 30, 1893.

These and similar acts were construed by the Supreme Court, in 16 Pickle, 79, holding the license valid.